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Supreme Court, U.S.
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No. 00-1661

IN THE

Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,

Petitioner,

v.

SEABOARD FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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1. According to Respondent, this Court should deny review because Petitioner complains about "the 'misapplication of a properly stated rule of law'" rather than about a pure error law. Opp. 5 (quoting Sup. Ct. R. 10). Respondent is mistaken.

The Eighth Circuit denied Petitioner's motion to intervene pursuant to Federal Rule of Civil Procedure 24(b) because Petitioner "failed to raise a claim or defense that shared a common question of law or fact with the underlying litigation." Pet. App. A5. Petitioner had argued that it did raise such a "common question" because it challenged a protective order entered in the underlying litigation. The Eighth Circuit rejected that argument, concluding that the requirements for intervention under Rule 24(b) are not met when "the only thing the motion for permissive intervention and the underlying litigation have in common are the materials covered by the protective order." *Id.* Under the Eighth Circuit's reading of the "commonality" requirement of Rule 24(b), all nonparties are barred from intervening for the sole purpose of challenging protective orders sealing court records.

Whether a nonparty seeking access to court records satisfies Rule 24(b)'s commonality requirement is a question of law and not a question of the proper application of an accepted legal standard. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-778 (3d Cir. 1994) (reviewing *de novo* the question whether a proposed intervenor seeking access to court records raises a question of fact or law in common with the main action as required by Rule 24(b) because that question concerns the "correct legal standard for intervention"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). As a result of the decision in this case, and the Eighth Circuit's previous decision in *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990), nonparties without a stake in the underlying litigation — such

as members of the media and nonprofit groups like Petitioner — are denied any method by which to vindicate their common-law right of access in the Eighth Circuit. Moreover, as the panel explicitly recognized, it adopted a legal standard for intervention that departs from the standard in its sister circuits. Pet. App. A5. The split in authority on this important question of law merits this Court's review.

2. Respondent mistakenly claims that, in response to Petitioner's challenge, the district court "specifically reviewed the circumstances under which the magistrate judge entered the protective order." Opp. 10. To the contrary, because the district court denied Petitioner's motion to intervene, it denied Petitioner's motion to modify the protective order "as moot," without reaching the merits of that motion. Pet. App. A19.

The Eighth Circuit affirmed the district court's denial of Petitioner's motion to intervene, and thus also did not discuss the merits of Petitioner's challenge to the protective order. Accordingly, the legality of the protective order was never addressed by either the district court or the Eighth Circuit. Indeed, unless this Court overturns the Eighth Circuit's decision in this case, nonparties in the Eighth Circuit will never be able to obtain review of the legality of protective orders sealing court records because they will not be allowed to intervene to challenge such orders.

3. The Eighth Circuit's decision is at odds with this Court's precedent recognizing a common law right to obtain access to court records. As Respondent points out, the right to obtain access to records, like most individual rights, is "not absolute." Opp. 11 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). However, if that right exists at all

— and its existence is not in question after this Court's decision in *Nixon* — then a procedural mechanism must also exist to allow for its vindication. Intervention pursuant to Rule 24 is the only recognized method by which nonparties can interject themselves into litigation to challenge protective orders. *See, e.g., Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1989). Respondent does not suggest any other procedural method through which nonparties can seek to challenge protective orders. Because the Eighth Circuit's decision creates an absolute procedural bar to vindication of the common-law right to obtain access court records, it conflicts with the decisions of this Court establishing such a right.

4. The Eighth Circuit recognized that its decision conflicts with decisions of its sister circuits. Pet. App. A5 (quoting and citing cases from other cases with which it disagreed). As stated in the Petition, nine circuit courts permit nonparties to intervene solely for the purpose of seeking access to court records. Pet. 6-9 & n.2 (citing cases). Respondent argues that the Eighth Circuit is not in conflict with other circuits because, in some of the cases cited in the Petition, the courts rejected the intervenor's motion to vacate the order sealing court records. Opp. 13-14. However, Respondent does not deny that the courts in each of the cited cases permitted a nonparty to intervene to challenge the protective order at issue. Accordingly, these cases squarely conflict with the Eighth Circuit's ruling that nonparties seeking to challenge protective orders fail to satisfy the requirements for intervention under Rule 24(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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